Lembaga Tatatertib Peguam-Peguam v Wan Mohd Nazri bin Wan Hassan

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–45 OF 2006(W)
ABDUL HAMID MOHAMAD, ABDUL AZIZ MOHAMAD AND AZMEL FCJJ
28 FEBRUARY 2007

Legal Profession — Professional discipline — Disciplinary Committee — Power of Disciplinary Board to appoint — Whether such power an independent and distinct power — Whether such power refers to all three circumstances under s 103A — Legal Profession Act 1976 s 103A paragraphs (a), (b), (c)

Legal Profession — Professional discipline — Procedure — Whether Disciplinary Board obliged to first appoint an Investigating Tribunal to investigate into complaint before appointing a Disciplinary Committee — Legal Profession Act 1976 ss 103A, 103B

Words & Phrases — 'Determine' — Legal Profession Act 1976 s 103A paragraph (a)

In the instant case, the Disciplinary Board ('the Board') appointed a Disciplinary Committee pursuant to s 103A para (a) of the Legal Profession Act 1976 ('the Act') to investigate a complaint against the respondent. The Board did so without first appointing an Investigating Tribunal under s 100 of the Act to investigate the complaint. The respondent, after the Disciplinary Committee had commenced to hear the complaint, brought proceedings in the High Court to invalidate the disciplinary proceedings brought against him. He also sought an injunction to stop further proceedings against him by the Disciplinary Committee. The respondent succeeded in the High Court, on appeal by the Board, in the Court of Appeal. The Board was given leave to appeal to the Federal Court. The Federal Court had to consider the question whether by virtue of ss 103A and 103B, the Board is vested with an independent and distinct power to appoint a Disciplinary Committee forthwith under any one of the circumstances prescribed by s 103A of the Act.

Held, answering the question affirmatively:

(1) With reference to the circumstance falling under paragraph (a) of s 103A of the Act, the Board is vested with 'an independent and distinct' power to appoint a Disciplinary Committee. It is a power that is independent of and distinct from its power or duty under s 102(2) of the Act to appoint a Disciplinary Committee only after the Investigating Tribunal has made its report (see para 13).

(2) The power to 'forthwith appoint a Disciplinary Committee' under s 103A is a power that applies equally to each of the circumstances under paragraphs (a), (b) and (c) (see para 14).

(3) The word 'determines' in para (a) of s 103A of the Act denotes the making of a decision by the Disciplinary Board on its own volition and not as a response under s 102(2) of the Act to a recommendation of the Investigating Tribunal (see para 15).

(4) Section 103B which sets out the composition of the Disciplinary Committee prescribes two instances where a Disciplinary Committee may be appointed. The first instance is in respect of cases where an Investigating Tribunal has been appointed. The second instance is in respect of cases under s 103A. The second instance thus refers to cases under all three circumstances of s 103A — which are not cases where an Investigating Tribunal has been appointed (see para 16).

(5) The independent and distinct power of the Board to appoint a Disciplinary Committee in the circumstance of paragraph (a) of s 103A means that where the Board receives a complaint concerning the conduct of an advocate and solicitor it has an unfettered discretion to determine that there should be a formal investigation and to straight away appoint a Disciplinary Committee for such purpose. It is not therefore bound under s 100(1) to 'forthwith constitute an Investigating Tribunal' to make recommendations to it as to whether there should be a formal investigation by a Disciplinary Committee (see para 17).

[Bahasa Malaysia summary

Dalam kes ini, Lembaga Tatatertib ('Lembaga tersebut') telah melantik satu Jawatankuasa Tatatertib menurut s 103A perenggan (a) Akta Profesyen Undang-Undang 1976 ('Akta tersebut') untuk menyiasat aduan terhadap responden. Lembaga tersebut telah berbuat demikian tanpa terlebih dahulu melantik satu Tribunal Siasatan di bawah s 100 Akta tersebut untuk menyiasat aduan tersebut. Responden, selepas Jawatankuasa Tatatertib mula mendengar aduan tersebut, telah memulakan prosiding di Mahkamah Tinggi untuk membuktikan prosiding tatertib terhadapnya adalah salah. Beliau juga memohon satu injunksi untuk memberhentikan prosiding selanjutnya terhadapnya oleh Jawatankuasa Tatatertib. Responden berjaya di Mahkamah Tinggi, atas rayuan oleh Lembaga tersebut, di Mahkamah Rayuan. Lembaga tersebut telah membenarkan rayuan ke Mahkamah Persekutuan. Mahkamah Persekutuan telah menimbangkan persoalan sama ada menurut ss 103A dan 103B, Lembaga tersebut diberikan kuasa berasingan dan berlainan untuk melantik Jawatankuasa Tatatertib di bawah salah satu daripada keadaan yang ditetapkan oleh s 103 Akta tersebut.

Diputuskan, menjawab persoalan secara positif:

(1) Dengan merujuk kepada keadaan yang terdapat di bawah perenggan (a) kepada s 103A Akta tersebut, Lembaga tersebut diberikan kuasa 'independent and distinct' untuk melantik Jawatankuasa Tatatertib. Ia adalah kuasa yang

berasingan dan berlainan daripada kuasa dan tugasnya di bawah s 102(2) Akta tersebut untuk melantik Jawatankuasa Tatatertib hanya selepas Tribunal Siasatan telah membuat laporannya (lihat perenggan 13).

(2) Kuasa untuk 'forthwith appoint a Disciplinary Committee' di bawah s 103A adalah kuasa yang digunakan untuk setiap keadaan di bawah perenggan (a), (b) dan (c) (lihat perenggan 14).

(3) Perkataan 'determines' dalam perenggan (a) kepada s 103A Akta tersebut bermaksud membuat satu keputusan oleh Lembaga Tatatertib atas kerelaannya dan bukan sebagai jawapan di bawah s 102(2) Akta tersebut terhadap satu saranan Tribunak Siasatan (lihat perenggan 15).

(4) Seksyen 103B yang menetapkan komposisi Jawatankuasa Tatatertib menggambarkan dua keadaan di mana suatu Jawatankuasa Tatatertib boleh dilantik. Keadaan pertama adalah berhubung kes-kes di mana Tribunal Siasatan telah dilantik. Keadaan kedua adalah berkaitan kes-kes di bawah s 103A. Keadaan kedua merujuk kepada kes-kes di bawah ketiga-tiga keadaan s 103A — yang bukan kes-kes di mana Tribunal Siasatan telah dilantik (lihat perenggan 16).

(5) Kuasa Lembaga tersebut yang berasingan dan berlainan untuk melantik Jawatankuasa Tatatertib dalam keadaan perenggan (a) kepada s 103A bermaksud bahawa di mana Lembaga tersebut menerima aduan berkaitan perlakuan seorang peguambela dan peguamcara ia mempunyai budi bicara untuk menentukan bahawa sepatutnya ada siasatan formal dan dengan segera melantik satu Jawatankuasa Tatatertib bagi tujuan itu. Ia tidak terikat di bawah s 100(1) untuk 'forthwith constitute an Investigating Tribunal' untuk membuat saranan berhubung sama ada perlunya ada siasatan formal oleh Jawatankuasa Tatatertib (lihat perenggan 17).]

Notes

For cases on procedure, professional discipline, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1868–1902.

Legislation referred to

Legal Profession Act 1976 ss 93, 94, 95, 96, 97, 98, 99, 100, 101,102,103

Appeal from: Civil Appeal No J–W–02–1199 of 2005 (Court of Appeal, Putrajaya)

Datuk N Chandran (Maidzuara Mohammed with him) (Logan Sabapathy & Co) for the appellants.

Alex De Silva (S Shamalah with him) (De Silva) for the respondent.

Abdul Aziz Mohamad FCJ (delivering judgment of the court):

[1] Pursuant to a complaint concerning the respondent's conduct as an advocate and solicitor, the Disciplinary Board appointed a Disciplinary Committee by virtue

of paragraph (a) of s 103A of the Legal Profession Act 1976 ('the Act') without constituting an Investigating Tribunal under s 100 to investigate into the complaint and report its findings to the Disciplinary Board. Taking the stand that this was wrong, the respondent, after the Disciplinary Committee had commenced to hear the complaint, brought proceedings in the High Court for declarations to invalidate the disciplinary proceedings brought against him so far and for an injunction to stop further proceedings against him by the Disciplinary Committee. The respondent succeeded in the High Court and also, on appeal by the appellant Disciplinary Board, in the Court of Appeal.

[2] In the High Court and the Court of Appeal, it was agreed that there was only one main issue to be decided in this case, namely:

> Whether the defendant can proceed with a complaint made against the plaintiff, by appointing a Disciplinary Committee without first appointing an Investigating Tribunal to inquire into the complaint and submit a report, pursuant to the provisions of the Act.

[3] The appellants were granted leave to appeal to this court on the following question:

> whether, on the express provisions under ss 103A and 103B of the Legal Profession Act 1976 [Act 166] ('LPA'), the Disciplinary Board is vested with an independent and distinct power to appoint a Disciplinary Committee forthwith under any one of the circumstances as set out in s 103A LPA?

[4] Disciplinary proceedings against advocates and solicitors are regulated by a number of sections in Part VII of the Act. Major changes in the disciplinary hierarchy and procedure were effected by the Legal Profession (Amendment) Act 1992 ('Act A812') through the substitution of ss 93 to 103 of the Act, which are in Part VII, with new provisions and the addition in that Part of new ss 103A to 103E. Several of those new ss 93 to 103E were later amended by the Legal Profession (Amendment) Act 1993 ('Act A861'). Further major changes in hierarchy and procedure, including the abolition of the Investigating Tribunal, were effected by the Legal Profession (Amendment) Act 2006 ('Act A1269') which came into force on 2 October 2006, but they do not affect the case of the respondent because, by virtue of s 35 of that Act, his case continues to be governed by the applicable provisions as they stood before Act A1269 came into force. Therefore the provisions of the Act that we will be referring to are provisions introduced by Act A812 as amended by Act A861 but as unamended by Act A1269.

[5] The Disciplinary Board is established under s 3. Section 94(1) vests it with control over all advocates and solicitors 'for the purposes of all disciplinary actions'. Section 94(2) lays down the penalty for 'misconduct': striking off the roll or suspension for a period. Section 94(3) defines 'misconduct'. It includes 'conviction of a criminal offence which makes him unfit to be a member of his profession'.

Section 94(4) provides that in certain circumstances pertaining to an advocate and solicitor, such as where he is found guilty by a court of law of any offence involving dishonesty, the Bar Council, the governing body of the Malaysian Bar, may apply to the Disciplinary Board for an order suspending him from practice until further notice, if the Bar Council considers that such suspension 'would be in the public interest or in the interest of his clients or of the profession'.

[6] Section 95 requires, for the purposes of disciplinary proceedings under Part VII of the Act, that there be established a Disciplinary Committee Panel 'with a Disciplinary Committee established under it' and an Investigating Tribunal Panel 'with an Investigating Tribunal established under it'. Those Panels are appointed by the Disciplinary Board under ss 96 and 97.

[7] By s 99(1), any complaint concerning the conduct of an advocate and solicitor must in the first place be made or referred to the Disciplinary Board. By s 100(1) the Disciplinary Board 'shall, if it considers that there is merit in the... complaint, forthwith constitute an Investigating Tribunal', and that is done by appointing, under s 100(2), three members from the Investigating Tribunal Panel. That was not done in this case and that was what the respondent contended the appellants should have done.

[8] The duty of the Investigating Tribunal is, according to s 101(1), to investigate into the complaint and report its findings to the Disciplinary Board, and also, according to s 102(1), to make any one of three recommendations, two of which are either that a formal investigation is not necessary or that there should be a formal investigation by a Disciplinary Committee. Section 102(2) provides as follows:

> (2) If the Investigating Tribunal in its report recommends —
>
> (a) that there should be a formal investigation, then the Disciplinary Board shall constitute a Disciplinary Committee; or
>
> (b) that a formal investigation by a Disciplinary Committee is not necessary, the Disciplinary Board may, if it disagrees with the recommendation, appoint a Disciplinary Committee.

[9] Section 103A provides as follows:

> 103A. Where —
>
> (a) the Disciplinary Board determines that there should be a formal investigation; or
>
> (b) an advocate and solicitor has been convicted of an offence of criminal breach of trust under s 409 of the Penal Code [Act 574] or any other offence involving fraud or dishonesty; or
>
> (c) the advocate and solicitor has been suspended under s 94(4) of this Part,
>
> the Disciplinary Board shall forthwith appoint a Disciplinary Committee which shall hear and investigate the matter.

It was in reliance on paragraph (a) that the appellant Disciplinary Board appointed the Disciplinary Committee in this case.

[10] Section 103B provides as follows:

> 103B. (1) The Disciplinary Board shall appoint a Disciplinary Committee to consider, in cases where an Investigating Tribunal has been appointed, the report of the Investigating Tribunal, or to investigate and make recommendations to the Disciplinary Board in respect of cases under s 103A.
>
> (2) A Disciplinary Committee shall consist of three members of whom [sic] shall be —
>
> (a) two advocates and solicitors; and
>
> (b) one lay persons [sic],
>
> appointed from the Disciplinary Committee Panel.
>
> (3) The Disciplinary Board shall appoint a member from paragraph (a) of subsection (2) to be the chairman of the Disciplinary Committee.

[11] Section 103C sets out the choice of recommendations one of which the Disciplinary Committee is required to make to the Disciplinary Board according to the recorded findings of fact that it has made after 'hearing and investigating any matter referred to it'. Section 103D provides for the orders that the Disciplinary Board may make after considering the report of the Disciplinary Committee.

[12] The respondent rightly accepted, as the High Court and the Court of Appeal rightly thought, that in the circumstances mentioned in paragraphs (b) and (c) of s 103A the Disciplinary Board may appoint a Disciplinary Committee directly without first constituting an Investigating Tribunal under s 100(1). The reasons are not difficult to see. As regards paragraph (b), conviction of a criminal offence which makes an advocate and solicitor unfit to be a member of his profession is, as s 94(3) says, a misconduct; and for it disciplinary proceedings may be taken against him. The fact that paragraph (b) singles out conviction of specific offences of that nature means that a case of conviction of any of the specific offences is to be subject to a different disciplinary procedure from cases of conviction of other offences of that nature, that is, a procedure where a Disciplinary Committee is appointed directly without an Investigating Tribunal having first to be constituted. As regards paragraph (c), there can be no question of having to appoint an Investigating Tribunal because, as has been seen, a suspension under s 94(4) comes about not from a complaint to the Disciplinary Board but from an application by the Bar Council for suspension. Therefore the question that we had to answer actually turned on the circumstance in paragraph (a) of s 103A. We answered the question in the affirmative and allowed the Disciplinary Board's appeal.

[13] It was for a combination of three reasons that we were of opinion that in the circumstance in paragraph (a) of s 103A the Disciplinary Board is vested with 'an independent and distinct' power to appoint a Disciplinary Committee, that is,

a power that is independent of and distinct from its power or duty under s 102(2) to appoint a Disciplinary Committee, which arises only after the Investigating Tribunal has made its report and which therefore cannot arise unless an Investigating Tribunal has been constituted.

[14] The first reason is this. The requirement of s 103A that 'the Disciplinary Board shall forthwith appoint a Disciplinary Committee which shall hear and investigate the matter' is, as the s is drafted, a requirement that applies equally to each of the circumstances in paragraphs (a), (b) and (c). Since the power to appoint that is implicit in that requirement is independent of and distinct from the power to appoint under s 102(2) where the circumstances in paragraphs (b) and (c) are concerned, it must be so too where the circumstance in paragraph (a) is concerned. There could not have been intended a severance, splitting or dichotomizing of the quality of the power according to which of the three circumstances it is that may be in question.

[15] For the second reason, it is expedient to first quote what Zulkefli Makinudin JCA, speaking for the Court of Appeal panel, said: 'The phrase 'a formal investigation' found in … Section 103A(a) has appeared earlier in ss 102 and 103 of the Act … It is my view whether there should be a formal investigation or not as envisaged by s 103A(a) of the Act it must be subject to a report made by the Investigating Tribunal under s 102(2) of the Act'. In those words, there seems to be a perception that the decision of the Disciplinary Board under paragraph (a) of s 103A that there should be a formal investigation, upon which the s requires it to 'forthwith appoint a Disciplinary Committee', is somehow related to what happens under s 102(2), which involves the report of the Investigating Tribunal, or somehow flows from that section. It must be observed that in paragraph (a) of s 103A the word is 'determines'. The Disciplinary Board determines that there should be a formal investigation. Section 102(2) has two paragraphs. Under paragraph (a), the Disciplinary Board is bound to constitute a Disciplinary Committee if the Investigating Tribunal recommends that there should be a formal investigation. There is no question under that paragraph of the Disciplinary Board determining that there should be a formal investigation. Under paragraph (b), the Disciplinary Board is given the discretion to nevertheless appoint a Disciplinary Committee, even where the Investigating Tribunal recommends that a formal investigation is not necessary, if it disagrees with the recommendation. Of course the disagreement with the recommendation means that the Disciplinary Board thinks or takes the view that a formal investigation is necessary, but paragraph (b) does not speak of the Disciplinary Board determining that there should be a formal investigation. We were of the view that the word 'determines' in paragraph (a) of s 103A is intended to denote the making of a decision by the Disciplinary Board on its own volition and not as a response under s 102(2) to a recommendation of the Investigating Tribunal. That is the second reason.

[16] The third reason lies in s 103B(1). Section 103B is basically intended to set out the composition of the Disciplinary Committee, which has not been set out

before, whereas the composition of an Investigating Tribunal has been set out in s 100(2). As the duty to appoint a Disciplinary Committee has been laid down in ss 102(2) and 103A, and in view of its contents, s 103B(1) is basically intended to be a recapitulation of the instances, already laid down in ss 102(2) and 103A, when the Disciplinary Board 'shall' appoint a Disciplinary Committee, coupled with a statement of what the Disciplinary Committee has to do, and is not intended to provide for other instances of appointment of a Disciplinary Committee. Section 103B(1) looks to two instances of appointment in terms of the purpose of the appointment. One instance is that of an appointment of a Disciplinary Committee to consider the report of the Investigating Tribunal. That applies 'in cases where an Investigating Tribunal has been appointed'. Those have to be cases where the appointment was pursuant to s 102(2). The other instance is that of an appointment of a Disciplinary Committee to investigate and make recommendations to the Disciplinary Board in respect of cases under s 103A. There is in one or two respects a want of consistency between s 103B(1) on the one hand and ss 102(2) and 103A on the other. For example, ss 103B says that in the first of the instances the Disciplinary Committee is 'to consider … the report of the Investigating Tribunal' whereas the implication to be drawn from paragraph (a) of s 102(2) is that the Disciplinary Committee's function is to carry out a formal investigation. But this want of consistency does not detract from the fact that s 103B(1) is intended to refer back to ss 102(2) and 103A. The important thing to note from s 103B(1) for the question in the appeal is that the first instance is of 'cases where an Investigating Tribunal has been appointed'. That means that the second instance, that of 'cases under s 103A', that is cases under all the three circumstances of the section, including the circumstance in paragraph (a) thereof, are not cases where an Investigating Tribunal has been appointed. That is the third reason.

[17] The independent and distinct power of the Disciplinary Board to appoint a Disciplinary Committee in the circumstance of paragraph (a) of s 103A means that where the Disciplinary Board receives a complaint concerning the conduct of an advocate and solicitor it has an unfettered discretion to determine that there should be a formal investigation and to straight away appoint a Disciplinary Committee for the purpose and is not bound under s 100(1) to 'forthwith constitute an Investigating Tribunal' to make recommendations to it as to whether or not there should be a formal investigation by a Disciplinary Committee. One reason why the Court of Appeal was not in favour of the appellant's construction of s 103A(a) is the absence of express provisions setting out the types of complaint to deal with which the Disciplinary Board may straight away act under the section and appoint a Disciplinary Committee instead of first appointing an Investigating Tribunal under s 100(1). The Court of Appeal envisaged that disputes might arise on the question, the determination of which would require the court 'to insert words into the Act', and 'this would go clearly against all principles of statutory interpretation'. Once, however, it is accepted that the Disciplinary Board has an unfettered discretion to act under s 103A(a), the concern expressed by the Court of Appeal would not arise. It is true that the provisions that involve the Investigating Tribunal would become a dead letter if in every case the Disciplinary Board chooses to act under s 103A(a), but that is the inevitable consequence of the manner in which, in our

judgment, the section has to be construed, and such a consequence ought not to inhibit such a construction.

Question answered in the affirmative.

Reported by John Paul Simon